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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

ARTHUR ANDERSEN & CO.
Petitioner

v.

DAVID S. STEWART and
CHANNING SECURITIES, INC.
Respondents

ARTHUR ANDERSEN & CO.
Petitioner

v.

JULES SANDERS and MADALYNN SANDERS
Respondents

AND THREE OTHER ACTIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GEORGE H. LEWALD
THOMAS G. DIGNAN, JR.
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

CHARLES W. BOAND
Wilson & McIlvaine
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212
Attorneys for Petitioner

Of Counsel:

WILLIAM F. MCCARTHY
STEVEN T. HOORT
JESS T. FARDELLA
Ropes & Gray
225 Franklin Street
Boston,
Massachusetts 02110
(617) 423-6100

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Arthur Andersen & Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in these consolidated cases on January 22, 1980, petition for rehearing denied on February 19, 1980. The respondents are the plaintiffs and named class representatives in the two actions below in which the District Court has made a class action determination.

OPINION BELOW

In the Appendix attached hereto is set forth the opinion and judgment of the United States Court of Appeals for the First Circuit in which it dismissed petitioner's consolidated appeals from an order and an Order and Final Judgment of the District Court for the District of Massachusetts in *In Re Viatron Computer Systems Corporation Litigation*, No. 79-1351, No. 79-1452 (Jan. 22, 1980) (*App.* 1-8). The decision is officially reported at 614 F.2d 11 (1st Cir. 1980). A petition for rehearing was denied by the Court of Appeals without opinion (*App.* 9). There is no opinion of the District Court.

JURISDICTION

These appeals came before the Court of Appeals under 28 U.S.C. § 1291 and the collateral order doctrine articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The judgment of the Court of Appeals for the First Circuit was entered on January 22, 1980, and a timely petition for rehearing was denied by the Court of Appeals on February 19, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When individual class members in a class action for damages are for the first time specifically identified after an initial class notice is mailed, but prior to trial, does not Fed. R. Civ. P. 23(c)(2) and due process require the District Court to direct individual notice to these newly identified class members of the right of each to intervene in the action or to exclude himself from the class?

2. May the failure to object to an initial notice to the class be used to estop a defendant from thereafter asserting that class members identified after the initial notice but prior to any disposition on the merits must be provided

with individual notice of their rights to intervene in the action or to exclude themselves from the class as mandated by Fed. R. Civ. P. 23(c)(2)(A)(B)(C)?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment to the Constitution of the United States (*App.* 9). The rule setting forth the mandatory notice to be provided to class members in class actions for damages is Rule 23(c)(2)(A)(B)(C), Fed. R. Civ. P. (*App.* 11), and Rule 23 in general (*App.* 10-12). These provisions are reproduced in the attached appendix submitted herewith.

STATEMENT OF THE CASE

The petitioner Arthur Andersen & Co. ("Andersen") is an auditing and accounting firm named as a defendant in actions brought by the named plaintiffs pursuant to Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, and § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and S.E.C. Rule 10b-5 promulgated pursuant thereto, in which plaintiffs seek damages on behalf of themselves and all purchasers of the common stock and convertible subordinated debentures issued by Viatron Computer Systems Corporation ("Viatron"). These actions were commenced in 1971 following the filing of a petition in bankruptcy by Viatron and have been consolidated in the District of Massachusetts by the Judicial Panel on Multidistrict Litigation for coordinated pretrial discovery pursuant to 28 U.S.C. § 1407(a).

In 1974, the District Court determined that two of the actions could be maintained as class actions for damages under Rule 23(b)(3), Fed. R. Civ. P., on behalf of the Viatron common stock and debenture purchasers, respectively,

and directed that a joint notice of pendency of the class actions be mailed to the Viatron common stock and debenture purchasers as appearing on the records of Viatron's transfer agent (*App.* 13-16). These orders, issued under Rule 23(c)(1) and (c)(2), Fed. R. Civ. P. (*App.* 10-11), did not direct any individual notice to those class members who had purchased Viatron securities for which record title was held in "street names" by brokerage houses, banks, and other entities as nominees of the purchasers (*App.* 13, 16).[1] (These latter class members are hereafter referred to as the "beneficial purchasers" of Viatron securities.) No proof of any service of the 1974 notice on any beneficial purchasers has been presented to or filed with the District Court.

In November of 1978, and prior to any trial or judgment, the plaintiff class representatives entered into a stipulation of settlement with the defendants who were the underwriters of Viatron's securities offerings. The underwriters agreed to provide to plaintiffs the names and addresses of beneficial purchasers for whom the underwriters had acted

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[1] The holding of securities in "street names" refers to the practice whereby a brokerage house, bank or other entity registers in its name securities purchased and owned by others. Under the practice, the brokerage house, bank or other entity is known as the record holder of the security, and the actual purchaser and owner of the security is known as the beneficial purchaser or beneficial owner. *See generally Final Report of the Securities and Exchange Commission of the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities Pursuant to Section 12(m) of the Securities Exchange Act of 1934,* CCH Sec. L. Reps. No. 672 (Dec. 15, 1976). *See also In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, 673 (2d Cir. 1978), *modified on other grounds* 599 F.2d 1109 (2d Cir. 1979). Under this Court's holding in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), *reh. denied* 423 U.S. 864 (1975), the actual class members in an action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), are the persons who suffered a loss in connection with a purchase or sale of securities, which would be the beneficial purchasers of those securities rather than those holding record title in "street names" as nominees of the purchasers.

as nominees, so that plaintiffs could give individual notice of this partial settlement and a proof of claim form to the underwriters' customers who fell within the classes as defined in 1974. Plaintiffs also proposed to obtain the cooperation of brokerage houses, banks and other entities serving as nominees of beneficial purchasers, so as to provide other beneficial purchasers with individual notice of the partial settlement and a proof of claim form, by compensating these non-party nominees for their expenses in identifying their beneficial purchaser customers. In response, petitioner Andersen asserted that individual notice had not previously been directed to any beneficial purchaser class members and that all of the beneficial purchasers whose identity could be ascertained through reasonable efforts must, under this Court's intervening decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), be provided with individual notice of their rights as class members to intervene in the action or opt out of the class, in conformance with Rule 23(c)(2)(A)(B)(C).

Andersen's argument that identifiable beneficial purchasers must be provided with individual notice of their rights to intervene or opt out was rejected by the District Court. In an order under date of May 7, 1979 (*App.* 17), the District Court directed individual notice to the beneficial purchasers of the partial settlement, but the notice (*App.* 20) was devoid of any reference to beneficial purchaser class members having a right or an opportunity to intervene in the action or to exclude themselves from the classes. The District Court refused to provide the beneficial purchasers with notice of their rights as class members as required by Rule 23(c)(2)(A)(B)(C) despite its finding that the criterion under Rule 23(c)(2) mandating the giving of such notice were established. Specifically, in directing individual notice of the partial settlement, the standard employed by the District Court for the giving of such notice was the reasonable efforts standard of Rule 23(c)(2), Fed. R. Civ.

P., *viz.*, that the partial settlement notice was to be mailed to the "reasonably available names and addresses of beneficial purchasers for whom [the underwriters] acted as nominees," and to such additional beneficial purchasers as plaintiffs' counsel could identify through "such reasonable steps as the Court determines are necessary. . ." (*App.* 19).

Counsel for plaintiffs filed various reports and affidavits with the District Court with respect to identifying and providing individual notice of the partial settlement to in excess of 4,600 beneficial purchasers (*App.* 22), including 1,592 beneficial purchaser class members identified from the records of the underwriter defendants, in addition to the 11,560 persons holding record title to Viatron securities.

Andersen's continuing objections to the notice and motions for a stay and rehearing were denied by the District Court. Andersen appealed, asserting that the District Court had committed error on a collateral matter which would not be effectively reviewable on appeal, namely, in directing individual notice to the beneficial purchasers for the first time in 1979, the District Court failed and refused to provide notice of their right to intervene or exclude themselves under Fed. R. Civ. P. 23(c)(2)(A)(B)(C). Andersen asserted it was entitled to such notice prior to judgment to assure that any judgment in Andersen's favor against the classes would be binding on the newly identified class members and to avoid being exposed to the risks of one-way intervention by these class members following judgment.

The Court of Appeals declined to consider the merits of the issues raised by Andersen and dismissed Andersen's appeals for lack of standing. It held that Andersen's standing to object and to appeal was limited strictly to the orders making the initial class action determinations and directing the initial notice to the classes in 1974, and because no objection was made or appeal taken at that time

that Andersen was now estopped to raise issues regarding the notice to be provided to class members under Rule 23(c)(2), Fed. R. Civ. P. *See App.* 5-7. Andersen's petition for rehearing was denied on February 19, 1980 (*App.* 9).

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions of Federal Law Which Should be Settled by this Court

Resolution of the issues raised in this petition will have general application in all class actions for damages and involves consideration of the policies underlying amended Fed. R. Civ. P. 23. Without adequate notice, absent class members in a class action for damages are not bound by any judgment, *Eisen* v. *Carlisle & Jacqueline* (*Eisen IV*), 417 U.S. 156, 176-177 (1974). Unless the District Court remains under a continuing duty to assure that notice is adequate and defendants are not estopped to call to the court's attention that subsequent proceedings in the District Court demonstrate that the former notice is not adequate, the underlying purpose of amended Rule 23 will be defeated. Class members who have not received adequate notice can continue to engage in "sideline sitting," and to await the results of the action before deciding whether to be bound by the proceedings, which amended Rule 23 was intended to eliminate. *See* "Notes of the Advisory Committee on Proposed Amendments to Rule 23," 39 F.R.D. 69, 98-99, 105-106 (1966); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 547 (1974), *reh denied* 415 U.S. 952 (1974).

The issue of the adequacy of the initial notice in a class action for damages will arise whenever, as in this case, the District Court subsequently directs individual notice under either Rule 23(d) or (e), Fed. R. Civ. P., which is more inclusive than the original notice. It may also arise where through oversight or neglect the Court and the parties did not provide class members with adequate or the best prac-

ticable individual notice, with the result being that identifiable class members are not bound by the proceedings. *Jones* v. *Diamond,* 594 F.2d 997, 1023 (5th Cir. 1979), *reh. granted* 602 F.2d 1243 (5th Cir. 1979); *Bogard* v. *Cook,* 586 F.2d 399, 408-409 (5th Cir. 1978), *reh denied* 591 F.2d 102 (5th Cir. 1979), *cert denied,* — U.S. —, 100 S.Ct. 173 (1979). *Note: Collateral Attack on the Binding Effect of Class Action Judgments,* 87 Harv. L. Rev. 598 (1974).

Andersen is presented with such a situation in this case. The beneficial purchaser class members first identified and provided with individual notice in 1979 were not informed in that notice or otherwise of their rights as class members to intervene in the action or to opt out of the class which this Court held to be mandatory under Fed. R. Civ. P. 23(c)(2) in *Eisen IV.* The only notice in any sense "directed" to these beneficial purchasers which purported to inform them of their right to intervene or to opt out was the 1974 notice mailed to the nominees holding record title to the securities in "street names." Since that 1974 notice, the only Circuit directly addressing the issue has held that the form of constructive notice provided in 1974 is clearly inadequate as to beneficial purchasers who can be identified through reasonable efforts. *In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, 669-671 (2d Cir. 1978), *modified* 599 F. 2d 1109 (2d Cir. 1979). *See Id.,* 599 F.2d at 1110. Thus, on the record below, Andersen faces the prospect that all the beneficial purchaser class members first identified in 1979, approximately one-third of the identifiable class, will not be bound by any judgment in Andersen's favor against the class as defined by the District Court.

In this Court's decision in *Eisen IV,* the problem of adequate notice not being provided was resolved at that time by holding that inadequacies in notice are susceptible to being cured by redefining the class. 417 U.S. at 179, n. 16 (holding that dismissal of class action by reason of plain-

tiff's refusal to pay the cost of notice to all identifiable class members was without prejudice to efforts to redefine the class). *Cf. Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978) (holding a class action determination is inherently tentative and subject to revision prior to final judgment); *Accord: Deposit Guaranty National Bank, Jackson, Mississippi* v. *Roper*, 48 U.S.L.W. 4279, 4282 (3/19/80). However, following this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), the option of redefining the class so as to eliminate those members who have not been provided with adequate notice is no longer a practicable alternative. Under *Parklane Hosiery Co.*, even non-parties and persons not within the class would appear to be in a position to obtain the benefit of any findings adverse to the class action defendant by collaterally estopping the defendant in a subsequent suit. The result is in essence the same right of one-way intervention that amended Rule 23(c)(2) was intended to eliminate. Without adequate notice that is binding on class members, defendants cannot be assured of obtaining the full *res judicata* benefit of any judgment in their favor. Class members who have not received adequate notice, and similarly situated non-class members under *Parklane Hosiery Co.*, will receive the benefit of any decision adverse to the defendant whereas they will remain free to relitigate issues on which the defendant prevailed in the class action.

The proper resolution of this problem, and the only manner in which the purpose of eliminating one-way intervention can be achieved, is to require that the District Court provide adequate notice where its previous notice is demonstrably insufficient. Andersen requests that this Court hold that where the District Court finds prior to any trial or judgment or other disposition on the merits that there are additional class members who can be provided with individual notice through reasonable efforts, then such notice must be provided in the form set out in Fed. R. Civ. P.

23(c)(2)(A)(B)(C) in order to assure that the judgment will have the maximum preclusive effect consistent with due process. As is discussed below, this result is fully supported by prior decisions of this Court.

II. The Decision Below Conflicts with Decisions of this Court and of Other Circuits Regarding the Construction of Rule 23(c)(2), Fed. R. Civ. P., the Due Process Clause of Amendment V to the Constitution of the United States, and the Lack of Finality of Interlocutory Orders of the District Court

Although the Court of Appeals stated in its opinion that it found it unnecessary to consider this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), the holding of the Court of Appeals sanctioned exactly what this Court found to be impermissible under Fed. R. Civ. P. 23(c)(2) in *Eisen IV*. Following remand from the Second Circuit in *Eisen II, Eisen* v. *Carlisle & Jacquelin* (*Eisen II*), 391 F. 2d 555 (2d Cir. 1968), *reversing* 41 F.R.D. 147 (S.D.N.Y. 1966), *on remand* 52 F.R.D. 253 (1971), 54 F.R.D. 565 (1972), *reversed* 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), *vacated and remanded* 417 U.S. 156 (1974) (*Eisen IV*, the District Court had found that 2,250,000 of 6,000,000 buyers and sellers who had traded in odd lots could be identified through the parties' access and comparison of computer listings, 52 F.R.D. at 257-258. but declined to require individual notice to these individual odd-lot buyers and sellers. 52 F.R.D. at 267-268. Upon review, this Court held that individual notice to these 2,250,000 identifiable class members was mandatory, including notice of their right to intervene or to opt out under Fed. R. Civ. P. 23(c)(2)(A)(B)(C), even though plaintiffs contended that the effort and expense of providing individual notice would be so burdensome as to defeat the class action. 417 U.S. at 175. Prior to the decision in *Eisen IV,* this Court had held,

even apart from the express requirements of Fed. R. Civ. P. 23(c)(2), that forms of notice other than individual notice are not sufficient under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States with respect to those persons whose names and addresses are known or are ascertainable through reasonable efforts. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-320 (1950); *Schroeder* v. *City of New York*, 371 U.S. 208, 212-213 (1962).

In this case, the District Court determined in 1979 that in excess of 4,600 beneficial purchasers could be and were identified through reasonable efforts and that the individual notice of the partial settlement provided to these beneficial purchasers in 1979 was "the best notice practicable." (*App.* 19) However, it also declined in 1979 to provide these beneficial purchasers with notice of their right to intervene or to opt out, as required by Fed. R. Civ. P. 23(c)(2)(A)(B)(C), even though in 1974 the District Court had not directed that any individual notice be provided to these class members. Thus, on the record below, the same as in *Eisen IV*, the District Court has determined that class members are identifiable and has declined to direct individual notice to these class members of their rights under Fed. R. Civ. P. 23(c)(2).

The Court of Appeals in its opinion found it unnecessary to consider the application of this Court's holding in *Eisen IV* because in its view a defendant may raise issues regarding the adequacy of notice pursuant to Rule 23(c)(2), Fed. R. Civ. P., only when the initial class determination is made. Thus, the Court of Appeals concluded that Andersen's standing to object did not extend beyond the 1974 order approving the initial notice, and because no objection was made or appeal taken at that time, Andersen is now estopped to assert or to appeal that the initial class notice had not been directed to all identifiable class members in conformance with Rule 23(c)(2). *See App.* 5-7. No author-

ity was cited by the Court of Appeals in support of this "estoppel" conclusion, and we know of none.

This reasoning and holding of the Court of Appeals is in direct conflict with the principles articulated in applicable decisions of this Court and of decisions of other Circuits. Prior to entry of judgment, the District Court has complete power to revise its orders and to correct any error. *Marconi Wireless Telegraph Co. of America* v. *United States,* 320 U.S. 1, 47-48 (1943), *reh. denied* 320 U.S. 809 (1943); *John Simmons Co.* v. *Grier Bros. Co.,* 258 U.S. 82, 88-91 (1922)[2] *Cf. Coopers & Lybrand* v. *Livesay,* 437 U.S. at 468, 469 (class action determinations are subject to revision prior to judgment); 7 Moore's Federal Practice, ¶¶ 60.16[4], 60.20 (1979). A District Court's interlocutory orders are not viewed as final, and no appeal is required, until judgment has been properly entered. *United States* v. *Indrelunas,* 411 U.S. 216, 219-221 (1973); *Bankers Trust Co.* v. *Mallis,* 435 U.S. 381, 384-385 (1978), *reh denied* 436 U.S. 915 (1978); 9 Moore's Federal Practice, ¶ 110.18 [1980].[3] When an issue is raised for reconsideration either

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[2] *Accord: Hodgson* v. *United Mine Workers of America,* 473 F.2d 118, 125, n. 38 (D.C. Cir. 1972); *Acha* v. *Beame,* 570 F.2d 57, 63 (2d Cir. 1978); *Braden* v. *University of Pittsburgh,* 552 F.2d 948, 954-955 (3d Cir. 1977); *United States* v. *Jerry,* 487 F.2d 600, 604-605 (3d Cir. 1973); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 862 (5th Cir. 1970); *Cohn* v. *United States,* 259 F.2d 371, 376 (6th Cir. 1958); *Chicago Housing Tenants Organization, Inc.* v. *Chicago Housing Authority,* 512 F.2d 19, 22 (7th Cir. 1975); *Transportation-Communication-Division Brotherhood* v. *St. Louis-San Francisco RR Co.,* 419 F.2d 933, 935 (8th Cir. 1969), *cert. denied* 400 U.S. 818 (1970); *Pruseau* v. *Prudential Ins. Co. of America,* 591 F.2d 74, 79 (9th Cir. 1979); *United States* v. *Desert Gold Mining Co.,* 433 F.2d 713, 715 (9th Cir. 1970).

[3] An order of the District Court does not even have the practical finality for interlocutory review pursuant to 28 U.S.C. 1291 and the collateral order doctrine articulated in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), unless no further consideration of the order is likely by the District Court, *e.g., Coopers &*

before or after final judgment, the court is bound to view the issue in light of the facts that are available at that time. *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U.S. 238, 247-250 (1944). As ruled by the District of Columbia Circuit Court of Appeals:

> "Where, as here, a court's ruling has discretionary elements based on circumstances which are subject to alteration, the law recognizes the power and responsibility of the court to reconsider its ruling if a material change in circumstances has in fact occurred." *Hodgson* v. *United Mine Workers of America,* 473 F.2d 118, 125 (D.C. Cir. 1972).

The traditional lack of preclusive effect afforded to prejudgment orders of the District Court applies with even greater force to orders directing notice to class members pursuant to Rule 23(c)(2), Fed. R. Civ. P. The issue of the adequacy of notice can never be foreclosed, since the issue can always be raised by absent class members in a collateral attack upon the judgment. *Eisen IV,* 417 U.S. at 176-177; "Notes of the Advisory Committee on Proposed Amendments to Rule 23," 39 FRD 69, 106 (1966). The requirements of the rule are mandatory and are not capable of

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Lybrand v. *Livesay,* 437 U.S. at 477, n. 30 (1978) (the order must have "disposed of" an unsettled issue of national significance); *United States* v. *MacDonald,* 435 U.S. 850, 853-858 (1978); *Abney* v. *United States,* 431 U.S. 651, 659 (1977); *Eisen IV,* 417 U.S. at 171. The 1974 orders lacked even this practical finality. They were by their terms conditional (*App.* 14, 16), entered without objection, and no motion for rehearing or to revise the orders was made or denied until 1979, when the District Court overruled Andersen's objections and declined to direct individual notice to the newly identified beneficial purchasers in conformance with Rule 23(c)(2)(A)(B)(C), Fed. R. Civ. P. In 1979, the District Court further entered judgment dismissing as against the underwriter defendants all claims of the members of the classes as defined in 1974 (*App.* 24-25), and thereby determined the composition of the classes for all purposes of this litigation, including the continuing litigation against Andersen, in disregard of the deficiency in the notice provided to the beneficial purchasers.

being "waived."[4] Because Andersen has standing to raise issues regarding the adequacy of notice to assure that it receives the full *res judicata* benefit of any judgment in its favor, *Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340, 361, n. 30 (1978); *Bersch* v. *Drexel Firestone, Inc.,* 519 F.2d 974, 996 (2d Cir. 1975), *cert. denied sub nom Bersch* v. *Arthur Andersen & Co.,* 423 U.S. 1018 (1975), its standing must necessarily extend to the very situation where the notice to the class has become demonstrably inadequate.

Every aspect of the analysis and decision of the Court of Appeals conflicts with prior rulings by this Court and other Circuits. These conflicts justify the grant of certiorari to review the judgment below.

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[4] Mr. Justice Powell, speaking for the Court in *Eisen IV,* 417 U.S. at 176, stated that neither the District Court nor the parties may waive the requirements of Fed. R. Civ. P. 23(c)(2):

> "[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23."

More recently, this Court advanced a general policy of encouraging defendants in class actions to advance arguments appropriate to the rights of absent class members, and to the rights of those defendants, while reiterating that the duty to direct adequate notice in compliance with Fed. R. Civ. P. 23(c)(2) rests primarily upon the District Court. *Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340, 354, n. 21, 360 (1978).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the First Circuit, that judgment and opinion should be reversed, and this cause should be remanded with instructions to provide individual notice to the identifiable beneficial purchaser class members in conformance with Rule 23(c)(2)(A)(B)(C) of the Federal Rules of Civil Procedure.

Respectfully submitted,

ARTHUR ANDERSEN & Co.

GEORGE H. LEWALD
THOMAS G. DIGNAN, JR.
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

CHARLES W. BOAND
Wilson & McIlvaine
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212

Of Counsel:

WILLIAM F. MCCARTHY
STEVEN T. HOORT
JESS T. FARDELLA
Ropes & Gray
225 Franklin Street
Boston,
Massachusetts 02110
(617) 423-6100

May 5, 1980

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United States Court of Appeals

FOR THE FIRST CIRCUIT

Nos. 79-1351
79-1452

IN RE
VIATRON COMPUTER SYSTEMS
CORPORATION LITIGATION

ARTHUR ANDERSEN & CO.,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

BEFORE COFFIN, *Chief Judge,*
BOWNES, *Circuit Judge,*
CLARKE, JR., *District Judge.**

George H. Lewald, with whom *Thomas G. Dignan, Jr., William F. McCarthy, Steven T. Hoort, Ropes & Gray, Charles W. Boand,* and *Wilson & McIlvaine* were on brief for appellant.

Jared Specthrie, with whom *Stephen Moulton, Jerome M. Congress, Craig L. Tessler, Milberg, Weiss, Bershad & Specthrie,* and *Moulton & Looney* were on brief, for appellees.

January 22, 1980

COFFIN, *Chief Judge.* This appeal arises from five consolidated class actions brought on behalf of the purchasers of certain securities of Viatron Computer Systems Corp.

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* Of the Eastern District of Virginia, sitting by designation.

(Viatron), a Massachusetts corporation, after the filing of a bankruptcy petition by Viatron in 1971. Read together, the complaints allege violations of Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), in the issuance of documents which were allegedly materially misleading with respect to Viatron's prospects for survival. Among those named as defendants are Viatron's officers and directors, the underwriters of its convertible subordinated debenture and stock offerings, a consulting and engineering firm retained by the underwriters in connection with their due diligence inquiries, and the appellant, Arthur Andersen & Co. (Andersen), an auditing and accounting firm which certified the financial statements in the prospectus.

Following certification of two classes pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, a joint notice of pendency of the class actions was approved by the court and mailed to all transferees of record of the relevant Viatron securities in April of 1974. The notice was also published in the *Wall Street Journal.* Since the mailed notice approved by the district court was delivered only to transferees of record, it was not sent directly to class members who were beneficial purchasers of Viatron securities, that is, who purchased securities for which the record title was held in the "street names" of nominee brokerage houses, banks and other entities.[1] Instead, the court order provided that additional copies of the notice could be obtained by the street name nominees for forwarding to beneficial purchasers. At the time that the court approved this notice, appellant Andersen explicitly approved both its form and method of distribution.

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[1] For a more detailed description of the "street name" phenomenon, *see In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, 664 n.2, 673 (2d Cir. 1978) *modified,* 599 F.2d 1109 (2d Cir. 1979).

Five years later, after extensive discovery consisting of substantial document production as well as over one hundred days of depositions, counsel for the plaintiffs and the underwriter defendants agreed to a proposed settlement, subject to court approval, whereby the underwriters would pay $1,850,000 to be divided by the two main classes in full satisfaction of any liability which the underwriters might have. Counsel for the plaintiffs then applied to the district court for approval of both the settlement and the proposed method of distributing notice of it to the class members.

The method proposed for sending notice of the partial settlement to the class members was similar to that employed in distributing the 1974 notice in that it provided for mailing of individual notice to all transferees of record. It differed, however, in that the individual notices to be mailed to street names who might be nominees for unknown beneficial purchasers included a request that the nominee either forward copies of the notice to the beneficial purchasers or provide plaintiffs' counsel with their names and addresses. Plaintiffs' counsel further proposed that the settling underwriter defendants who held record title as nominees be directed by the court to submit "reasonably available" names and addresses of their beneficial purchaser customers, who could then be provided with individual notice.

On May 4, 1979, the district court held a hearing for the purpose of determining whether it should approve the partial settlement and notice pursuant to Rule 23(e). At this hearing, appellant Andersen objected to the proposed notice and method of distribution. In particular, Andersen claimed that the beneficial purchasers were entitled to individual notice and that the proposed method of notifying them was not the "reasonable effort" required by Rule 23, as interpreted in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) (*Eisen IV*). Andersen also claimed that the contents of the notice were inadequate.

The district court rejected Andersen's arguments and approved the proposed notice of partial settlement. The court did, however, order that the plaintiffs' counsel "shall take such reasonable steps as the court determines are necessary to identify and provide notice to beneficial purchasers and shall periodically report to the court thereon."[2] Andersen still regarded the order as unsatisfactory and brought this appeal.

Determining what efforts are required in order to attempt to provide notice to beneficial purchasers of securities held by street name nominees is far from a simple exercise. The only appellate court to attempt to make such a determination found that "reasonable efforts" must be made to send individual notice to such purchasers, *see In Re Franklin National Bank Securities Litigation,* 574 F.2d 662, (2d Cir. 1978) (*Franklin I*), *modified,* 599 F.2d 1109 (2d Cir. 1979) (*Franklin II*).

In this particular case, however, we need not reach the notice issue. Plaintiffs-appellees argue that Andersen does not have standing to appeal the court order approving the settlement notice and agreement. We find this argument persuasive and dispositive of this appeal.[3]

A nonsettling defendant does not ordinarily have standing to object to a court order approving a partial settlement since the nonsettling defendant is generally not affected by the settlement. *In Re Beef Industry Antitrust Litigation,* Nos. 78-3345-46 and 79-1010, slip op. at 1372 (5th Cir.

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[2] Pursuant to this order, plaintiffs' counsel twice mailed to the nominees letters requesting the names and addresses of beneficial purchasers and offering to pay the reasonable costs which the nominees might incur in complying with the request.

[3] Appellees also contend that the 1979 order is not appealable under the collateral order doctrine. In light of our holding that Andersen does not have standing to appeal the order, we do not address this issue.

Nov. 26, 1979); *Seiffer* v. *Topsy's Int'l, Inc.*, 70 F.R.D. 622, 631 n.11 (D. Kan. 1976); 3 Newberg on Class Actions § 5660b at 564-65 (1977). In this case, Andersen seeks to avoid this general rule by limiting its objections to the method of distribution and form of the notice, rather than the actual merits of the settlement. With regard to the notice and its method of distribution, Andersen asserts two reasons in support of its claim that it has standing.

First, Andersen notes that upon completion of this suit, it will be able to raise a res judicata bar to any future proceedings brought against it on the same issues by class members. *See Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir.), *cert. denied sub nom Bersch* v. *Arthur Andersen & Co.*, 423 U.S. 1018 (1975). If the notice to class members is deficient, however, then those members of the class who should have been given notice of the prior suit but were not might avoid the preclusive effect of this suit. *See Bogard* v. *Cook*, 586 F.2d 399, 408-09 (5th Cir. 1978). *See generally*, Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974). Thus, Andersen argues, if it is correct in its claim that the notice of partial settlement is deficient, it might lose the ability to protect itself against similar subsequent suits.

The defect in Andersen's argument is that a Rule 23(e) notice of partial settlement is not intended to serve as a Rule 23(c)(2) notice of the pendency of the suit. The Rule 23(c)(2) notice of pendency, issued in 1974, with its options for opting out, is the basis on which Andersen can subsequently raise its claims of preclusion. This notice was required, whether or not any settlement was contemplated. If the 1974 notice was adequate, and Andersen subsequently prevails in the litigation, it will receive the full preclusive effect of its victory whether or not the notice of partial settlement was even sent, much less sent properly.

Thus, Andersen's interest in maximizing the preclusive effect of any victory which it might achieve only establishes that it has standing to challenge the 1974 notice. While it is perhaps possible that the 1979 notice of partial settlement might have had the incidental effect of curing any defects in the 1974 notice, and thus Andersen can arguably claim to be "harmed" by the alleged failure of the 1979 notice to have had such an effect, we think this insufficient reason to allow Andersen to bootstrap its complaints with the 1974 notice into an attack on the 1979 notice of partial settlement. This is certainly not a case in which the two notices are in fact a single notice, *compare In Re Beef Industry Antitrust Litigation, supra* at 1373, *with In Re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1093 (5th Cir. 1977). Since Andersen did not object to the 1974 notice, it clearly had no right to assume that there would be a settlement five years later which might cure any defects in the 1974 notice. Once such a settlement in fact occurred, the process of finalizing it is best left to the court and the parties who are a part of it.

The second argument which Andersen raises in support of its claim of standing is that by granting it standing, we would insure that the absent members of the plaintiff class would have a surrogate to protect their rights to receive proper notice. With regard to the notice of partial settlement, however, the settling defendants have a much greater interest than does Andersen in assuring that the notice is proper, for they stand to lose the preclusive effect of the settlement if it is not. Moreover, the district court itself has an independent obligation to insure that the notice of settlement is proper. Fed.R. Civ. P. 23(e); *see* Note, *supra* at 602-03 n.72. Since the absent class members are thus not without protection, any additional benefits which might stem from allowing Andersen also to speak on their behalf are minimal and, we hold, are outweighed by the unnecessary frustrations of the settlement process — which itself is "highly favored in the law", *D. H. Overmeyer Co.* v. *Lof-*

lin, 440 F.2d 1213, 1215 (5th Cir. 1971) — that might result from the participation of a nonsettling defendant.

Finally, we note that Andersen cannot now appeal the court order approving the 1974 notice. If Andersen had objected to the 1974 notice in the district court when it was proposed, then perhaps Andersen could have immediately appealed the 1974 order approving the notice since it might have been final under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Corp.,* 337 U.S. 541 (1949), *cf. Eisen IV, supra* (order imposing costs of notice on defendants final). Moreover, if Andersen had objected in 1974, it might have even been possible to entertain an appeal concerning the order after final judgment is rendered in the case as a whole if the finality of the 1974 order under *Cohen* were in fact unclear, *cf. Drayer* v. *Krasner,* 572 F.2d 348, 353 n.6 (2d Cir. 1978) (Query whether a party against whom a *Cohen*-type final order was rendered but excusably failed to recognize it to be such should be precluded from questioning it on appeal from the truly final judgment . . ..")

Andersen, however, did not even object to the 1974 order until 5 years later after extensive discovery had passed, and it is not in the position of being able to proffer any excuse for its long delay in recognizing what it now claims to be a major defect in the 1974 notice, since the primary authority for its attack on the notice is the *Eisen IV* decision of 1974.[4] We therefore hold that Andersen has no standing to appeal the district court's 1979 order and is estopped from appealing the 1974 order.

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[4] Andersen also relies on the *Franklin I* decision; however, that was decided a full year before Andersen voiced any complaints.

United States Court of Appeals

FOR THE FIRST CIRCUIT

Nos. 79-1351
79-1452

IN RE
VIATRON COMPUTER SYSTEMS
CORPORATION LITIGATION

ARTHUR ANDERSEN & CO.,
DEFENDANT, APPELLANT.

JUDGMENT

Entered: January 22, 1980

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The appeals are dismissed in accordance with the opinion filed this day.

By the Court:

DANA H. GALLUP

Clerk.

United States Court of Appeals

FOR THE FIRST CIRCUIT

Nos. 79-1351
79-1452

IN RE
VIATRON COMPUTER SYSTEMS
CORPORATION LITIGATION

ARTHUR ANDERSEN & CO.,
DEFENDANT, APPELLANT.

ORDER OF COURT

Entered: February 19, 1980

It is ordered that the petition for rehearing filed on February 5, 1980 be, and the same hereby is, denied.

By the Court:

DANA H. GALLUP
Clerk.

AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine

by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class

or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JULES SANDERS, ET AL v. EDWARD M. BENNETT, ET AL	CIVIL ACTION No. 73-2594-T MDL-138 DOCKETED

MEMORANDUM AND ORDER

TAURO, D. J.

* * *

Accordingly, a class action is hereby maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure, said class to consist of all persons (which means individuals, corporations, partnerships, associations, joint stock companies, trust[*sic*] and unincorporated associations) who acquired or purchased shares of Viatron Computer Systems Corporation Common Stock during the period commencing December 23, 1969 and ending April 29, 1971. The names and addresses of members of the class to the extent presently ascertainable appear on the list of record holders furnished by First National City Bank, New York, the transfer agent for the Common Stock of Viatron Computer Systems Corporation.

Notice to the class, in the form annexed and marked Appendix B, shall be given by the clerk of this Court to the class pursuant to Rule 23(c)(2). Said notice shall be given to each member of the class as follows:

1. By depositing in the United States Mail, postage prepaid, on or before April 15, 1974, notice in said form as annexed, addressed to all transferees of record from December 23, 1969 to and including April 29, 1971, as shown on the list of record holders described above.

2. By publication of said notice on or before April 15, 1974, once in all editions of the *Wall Street Journal* of that day.

This Court finds that the within form of notice annexed and the giving of same are the best practicable under the circumstances.

The cost of notice by mailing as ordered in subparagraph 1 hereof, and the expense of notice by publication as ordered in subparagraph 2 hereof, shall be advanced by the plaintiffs subject to reimbursement pursuant to the provisions of Rule 54(d) of the Federal Rules of Civil Procedure for the United States District Courts. Proof of said mailing and publication shall be filed in this Court on or before .

This Order may from time to time be altered or amended under Rule 23(c)(1) *inter alia,* so as to divide the class into sub-classes where necessary and appropriate, and is without prejudice to any motion to modify or withdraw the class action determination.

J. L. TAURO

Dated: 2/26/74

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: VIATRON COMPUTER SYSTEMS CORPORATION (David S. Stewart, et al., v. Edward M. Bennett, et al.)	DOCKETED MDL-138 (71-3022-T)

MEMORANDUM AND ORDER

TAURO, D. J.

* * *

Accordingly, a class action is hereby maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure, said class to consist of all persons (which means individuals, corporations, partnerships, associations, joint stock companies, trusts and unincorporated associations) who acquired or purchased Viatron Computer Systems Corporation 6¼% Convertible Subordinated Debentures due December 1, 1989, during the period commencing December 23, 1969, through December 17, 1971, the date upon which the Complaint in this action was filed. The names and addresses of members of the class to the extent presently ascertainable appear on the list of record holders certified by the Indenture Trustee of the aforesaid Viatron Computer Systems Corporation Debentures which shall be furnished the Clerk of Court and marked as Appendix A on or before March 22, 1974.

Notice to the class, in the form annexed to this order and marked Appendix B, shall be given by the Clerk of this Court to the class pursuant to Rule 23(c)(2). The said notice shall be given to each member of the class as follows:

1. By depositing in the United States mail, postage prepaid, on or before April 15, 1974, notice in the form annexed, addressed to all holders of record from December 23, 1969, through December 17, 1971, as certified by the Indenture Trustee, The First National Bank of Boston.

2. By publication of said notice on or before April 15, 1974, once in all editions of the Wall Street Journal of that day.

This Court finds that the within form of notice annexed and the giving of same are the best practicable under the circumstances.

The cost of notice by mailing as ordered in subparagraph 1 hereof, and the expense of notice by publication as ordered in subparagraph 2 hereof, shall be advanced by the plaintiffs subject to reimbursement pursuant to the provisions of Rule 54(d) of the Federal Rules of Civil Procedure for the United States District Courts. Proof of said mailing and publication shall be filed in this Court on or before .

This Order may from time to time be altered or amended under Rule 23(c)(1) *inter alia,* so as to divide the class into sub-classes where necessary and appropriate, and is without prejudice to any motion to modify or withdraw the class action determination.

J. L. TAURO

Dated: 2/26/74

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKETED

IN RE VIATRON COMPUTER SYSTEMS CORPORATION LITIGATION	M.D.L. #138
DAVID STEWART, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 71-3022-T
	ORDER
JULES SANDERS, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 73-2594-T

WHEREAS, on February 26, 1974, *David Stewart* v. *Edward M. Bennett,* No. 71-3022-T *("Stewart"),* was ordered to proceed as a class action on behalf of all persons who acquired or purchased convertible subordinated debentures of Viatron Computer Systems Corporation ("Viatron") during the period from December 23, 1969 through December 17, 1971, and *Jules Sanders* v. *Edward M. Bennett,* No. 73-2594-T ("Sanders"), *(Stewart* and *Sanders* are collectively referred to as the "Actions"), was ordered to proceed as a class action on behalf of all persons who acquired or purchased common stock of Viatron during the period from December 23, 1969 through April 29, 1971;

• • •

WHEREAS, members of the *Stewart* and *Sanders* classes were given notice of the pendency of said Actions;

WHEREAS, the plaintiffs herein have entered into and filed a Stipulation of Settlement dated November 29, 1978 settling the claims asserted in these actions by the named plaintiffs herein on behalf of themselves and the classes certified herein as against the underwriter defendants and reserving the right of the plaintiffs and the classes to continue the actions against the non-settling defendants;

* * *

WHEREAS, the Stipulation of Settlement has been presented to the Court, after due deliberation, It Is Hereby ORDERED:

1. A hearing (the "Hearing") shall be held before this Court on Aug. 15, 1979 at 11:00 o'clock A.M., in Room , in the United States Courthouse, 1525 John W. McCormack Building, Boston, Massachusetts, for the purpose of determining, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, whether the partial settlement of these actions, as set forth in the Stipulation, should be approved as being fair, reasonable and adequate and in the best interest of the members of the classes in these Actions; and for the purpose of hearing petitions for interim allowance for expenses.

2. (a) On or before July 5, 1979, notice of the hearing on the proposed partial settlement, substantially in the form annexed hereto as Exhibit 1, with the Proof of Claim form annexed thereto, shall be caused to be mailed by Messrs. Milberg Weiss Bershad & Specthrie, and Messrs. Moulton and Looney, by first class mail, to all class members to whom the Notice of Class Determination was mailed by them pursuant to this Court's order dated February 26, 1974, at the last known addresses of

said class members appearing on the books of Viatron or its transfer agent;

(b) On or before June 27, 1979, the underwriters listed in Schedule A to the Stipulation of Settlement (who appear as record purchasers on the books of Viatron or its transfer agent) will provide plaintiffs with a list of the reasonably available names and addresses of beneficial purchasers for whom said firms acted as nominees during the class period and Messrs. Milberg Weiss Bershad & Specthrie and Messrs. Moulton and Looney shall cause notice to be mailed by first class mail to such beneficial purchasers;

(c) Plaintiffs shall take such reasonable steps as the Court determines are necessary to identify and provide notice to beneficial purchasers and shall periodically report to the Court thereon.

3. On or before July 5, 1979, notice of the hearing on the proposed partial settlement, substantially in the form annexed hereto as Exhibit 2, shall be caused to be published once in the National Edition of the Wall Street Journal.

4. Notice given in accordance with this Order meets the requirements of Rule 23 of the Federal Rules of Civil Procedure and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

* * *

Dated: Boston, Massachusetts
May 7, 1979

J. L. TAURO
U.S.D.J.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT FOR
DISTRICT OF MASSACHUSETTS
1525 John W. McCormack Building
Boston, Massachusetts 02109

NOTICE OF PARTIAL SETTLEMENT TO ALL PERSONS WHO (A) ACQUIRED OR PURCHASED DEBENTURES OF *VIATRON COMPUTER SYSTEMS CORPORATION* DURING THE PERIOD COMMENCING DECEMBER 23, 1969, THROUGH DECEMBER 17, 1971, or (B) ACQUIRED OR PURCHASED COMMON STOCK OF *VIATRON COMPUTER SYSTEMS CORPORATION* DURING THE PERIOD COMMENCING DECEMBER 23, 1969, THROUGH APRIL 29, 1971.

You are hereby notified pursuant to an Order of the United States District Court for the District of Massachusetts entered May 7, 1979.

* * *

INSTRUCTIONS TO NOMINEES

Counsel for the plaintiffs is attempting to obtain the name(s) and address(es) of all beneficial purchasers whose Viatron securities were held in the name of banks, brokerage firms or other nominees during the class period. If you are a nominee which is holding or has held Viatron securities for such beneficial purchasers and have not previously supplied the name(s) and address(es) of these beneficial purchasers to counsel for plaintiffs or defendants or have not agreed to forward the Notice and Proof of Claim described below to such beneficial purchasers, please read and comply with the enclosed Notice to Nominees by July 19, 1979 so that notice of the partial settlement in these Actions can be given to the beneficial purchasers of Viatron's securities.

Any nominee may, on its own, undertake to notify directly those beneficial purchasers for whom it is acting as nominee, provided that such nominee shall agree to forward the Notice and Proof of Claim in these actions to all the beneficial purchasers for whom it is acting as a nominee.

REQUIREMENT TO FILE PROOF OF CLAIM FORM

If you are a class member, and have not previously requested exclusion, you have to complete, sign and file the annexed Proof of Claim form in order to participate in the settlement and receive your proportionate share of the net settlement funds. The Proof of Claim form must be mailed by first-class mail, postmarked on or before October 3, 1979 in order to be timely filed. YOUR CLAIM MAY BE REJECTED IF NOT POSTMARKED BY OCTOBER 3, 1979.

If you do not file a claim form you will not receive any portion of the settlement fund, but you will be bound by the final judgments dismissing the Actions, and the Stipulation of Settlement, and you will be barred from any further assertion of released and settled claims. *To receive a portion of the settlement fund you must file a Claim Form in proper manner and mail it, by first class mail, postmarked on or before October 3, 1979.*

* * *

Dated: July 5, 1979.

Entered by Order of

HONORABLE JOSEPH L. TAURO
United States District Judge
For the District of Massachusetts

HONORABLE GEORGE F. McGRATH
Clerk
The United District Court for
The District of Massachusetts

MILBERG WEISS BERSHAD & SPECTHRIE
One Pennsylvania Plaza
New York, N.Y. 10001

(212) 594-5300

September 12, 1979

BY HAND

HONORABLE JOSEPH L. TAURO
U.S. District Judge
John W. McCormack Post Office
and Courthouse
Boston, Mass. 02109

Re: Viatron Computer Systems Corporation
Securities Litigation
No. MDL-138-T

Plaintiffs' Fourth Report to Court
Concerning Efforts to Identify
Beneficial Purchasers of Securities

Dear Judge Tauro:

Your order of May 7, 1979 scheduling a hearing on the proposed partial settlement with the underwriters provided that plaintiffs' counsel was to periodically report to the Court on their efforts to identify and provide notice to beneficial purchasers of Viatron securities. This letter will constitute plaintiffs' fourth report to the Court with respect to the efforts plaintiffs' counsel have taken pursuant to the order.

Since our last report we have received an additional 12 responses from nominees who either supplied us with the names of certain beneficial purchasers or stated that they would forward copies of the notice to their beneficial purchasers. An aggregate of 600 persons have been identified

as possible class members as a result of these 12 responses. Notice of the settlement and proof of claim form have been forwarded to these persons.

* * *

So far, we have thus identified approximately 4,600 persons who were not record purchasers but for whom others acted as nominees in the purchase of Viatron securities. Notice and proof of claim forms have been mailed to such persons. Our efforts are continuing.

Respectfully submitted,

MILBERG WEISS BERSHAD & SPECTHRIE

By JARED SPECTHRIE

MOULTON & LOONEY

By STEPHEN MOULTON

cc: All Counsel on
Viatron Service List

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE VIATRON COMPUTER SYSTEMS CORPORATION LITIGATION	M.D.L. #138
DAVID STEWART, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 71-3022-T
JULES SANDERS, ET AL., *Plaintiffs,* — against — EDWARD M. BENNETT, ET AL., *Defendants.*	CIVIL ACTION No. 73-2594-T

WHEREAS, the plaintiffs in each of the five above actions ("the Actions") have entered into and filed a Stipulation of Settlement dated November 29, 1978 ("the Stipulation") conditionally settling and compromising these actions as between the plaintiffs in the Actions, the class defined in paragraph (p) of the Stipulation, and the Managing Underwriter (defined in paragraph (i) of the Stipulation) on behalf of the Underwriters listed in Schedule A attached to the Stipulation; and

* * *

NOW, THEREFORE, after considering the Stipulation, the papers filed by the parties, the arguments of counsel and the entire record herein, and upon due deliberation, it is

ORDERED, ADJUDGED AND DECREED as follows:

1. The Stipulation is hereby approved and adjudged by the Court to be fair, reasonable and adequate, and the parties to the Stipulation are directed to consummate all of the terms and provisions of the Stipulation.

2. The Actions, including the claims asserted by R. Robert Popeo against the Underwriters (as defined in paragraph (1) of the Stipulation) in the *Stewart* Action be, and the same hereby are, dismissed as against the Underwriters with prejudice on the merits and without costs.

3. The Underwriters (as defined in paragraph (1) of the Stipulation) be, and the same hereby are, released and discharged from any claims, demands, causes of action and liabilities which the plaintiffs in the Actions, Channing Management Corporation, or any class member has, or may have, arising out of or relating to any transactions or occurrences set forth or referred to in the complaints in the Actions.

* * *

13. The Court hereby determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay and directs that this Order and Final Judgment be entered by the Clerk of the Court.

* * *

Dated: Boston, Massachusetts
August 15, 1979

JOSEPH L. TAURO, U.S.D.J.

ENTERED:

ELLEN M. HAYS,
Deputy Clerk of the Court

Supreme Court, U.S.
FILED
JUN 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1765

ARTHUR ANDERSEN & Co.,

Petitioner,

v.

DAVID S. STEWART and CHANNING SECURITIES, INC.,

Respondents.

ARTHUR ANDERSEN & Co.,

Petitioner,

v.

JULES SANDERS and MADALYNN SANDERS,

Respondents.

AND THREE OTHER ACTIONS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JARED SPECTHRIE
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

STEPHEN S. MOULTON
50 Congress Street
Boston, Massachusetts 02109
(617) 742-5550
Attorneys for Respondents

RECEIVED
JUN 6 1980
MICHAEL RODAK, JR., CLERK

Of Counsel:
MILBERG WEISS BERSHAD
& SPECTHRIE
One Pennsylvania Plaza
New York, New York 10119

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In the

Supreme Court of the United States

October Term, 1979

No. 79-1765

Arthur Andersen & Co.,

Petitioner,

v.

David S. Stewart and Channing Securities, Inc.,

Respondents.

Arthur Andersen & Co.,

Petitioner,

v.

Jules Sanders and Madalynn Sanders,

Respondents.

And Three Other Actions

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This brief is submitted in opposition to the Petition of Arthur Andersen & Co. ("Andersen") for a Writ of Certiorari to review the January 22, 1980 judgment and opinion of the United States Court of Appeals for the First Circuit, which dismissed Andersen's appeal for lack of standing and on grounds of estoppel. Andersen's Petition does not raise the "special and important reasons" which

are prerequisites for issuance of the writ. The primary issues upon which Andersen seeks review were never addressed by the Court of Appeals because the appeal was dismissed on other grounds. The decision below creates no conflict among circuits, is consistent with the decisions of this Court, and is eminently correct. There is no basis whatsoever for issuance of a writ of certiorari.

Jurisdiction

Andersen claims that appellate jurisdiction existed under 28 U.S.C. § 1291 and under the collateral order doctrine set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The respondents herein ("plaintiffs") took the position that the orders appealed from were interlocutory with respect to Andersen and that no basis for appellate jurisdiction existed. The Court of Appeals never decided the question of appellate jurisdiction because it dismissed the appeal for lack of standing and estoppel.

Questions Presented

1. Does a non-settling defendant in a class action have standing to challenge the form and method established for effectuating notice of a proposed partial settlement where the notice of pendency of class action was disseminated at an earlier date, the non-settling defendant is not a member of the class, and the interests of the non-settling defendant are in no way affected by the proposed settlement?*

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* As shown below, Andersen has conceded its lack of standing to challenge the notice of partial settlement. Respondents include the standing issue in "Questions Presented", however, because despite Andersen's concession, the Petition nevertheless seeks review of the form and method of the notice of partial settlement.

2. Is it within the discretion of a federal court to hold that a class action defendant is estopped from challenging the validity of a notice of pendency of class action when the defendant affirmatively consented to the method of notice of pendency, massive discovery occurred thereafter in reliance upon the validity of the notice, and five years elapsed before—on the eve of trial and only after announcement of a proposed partial settlement with other defendants—the defendant raised any questions with respect to the adequacy of the notice of pendency?

3. Did the form and method of the notice of partial settlement provided to class members in these actions comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure and with the due process clause of the United States Constitution?*

Statement of the Case

(a) *District Court Proceedings*

This litigation consists of five actions alleging violations of the federal securities laws in connection with the issuance of a December 1969 Registration Statement and Prospectus and subsequent documents concerning Viatron Computer Systems Corp. ("Viatron"). Defendants included Viatron's officers and directors; petitioner Andersen, which is the accounting firm which certified Viatron's financial statements; the underwriters of Viatron's December 1969 $25 million debenture issue; and various other defendants.

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* Andersen seeks to raise the issue of adequacy of notice before this Court despite the fact that the Court of Appeals never addressed that issue. Respondent believes that, in consequence, there is no basis for consideration of the notice issue by this Court. Respondent includes that issue among "Questions Presented" only because the issue is raised by Andersen in its Petition.

By orders entered February 26, 1974, the District Court certified *Sanders* v. *Bennett* and *Stewart* v. *Bennett* as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure.* Pursuant to those orders, a joint notice of pendency of class action was mailed to all transferees of record of the relevant Viatron securities during the class periods and was published in the Wall Street Journal. The District Court requested Andersen to review the proposed order on behalf of defendants, and Andersen expressly consented to the method of providing notice of pendency set forth in the February 26, 1974 orders (See R. App., p. 1a).**

After extensive discovery (including very substantial document inspection and over 100 days of depositions), and after many months of intensive negotiations, plaintiffs reached an agreement, subject to approval of the District Court pursuant to Federal Rule of Civil Procedure 23(e), to settle the class claims against the underwriter defendants for an aggregate of $1,850,000. Andersen raised various objections to the form and method of notice of the proposed partial settlement, including arguments (a) that the proposed method of notice did not comply with Rule 23(c)(2) of the Federal Rules of Civil Procedure because it involved insufficient efforts to identify beneficial owners of securities purchased in nominee name; and (b) that the notice of settlement should include a statement that class members still had the alternative of opting out of the class. The lat-

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* *Sanders* was certified as a class action on behalf of all persons who acquired Viatron common stock between December 23, 1969 and April 29, 1971. *Stewart* was certified as a class action on behalf of all persons who purchased Viatron debentures between December 23, 1969 and December 17, 1971.

** References to "R. App." are to the Respondents' Appendix annexed to this brief.

ter argument was raised on the theory that the 1974 notice of pendency of class action was also deficient because it allegedly failed to provide for sufficient efforts to identify the beneficial owners.

The District Court rejected Andersen's arguments in a context where all parties had agreed to the propriety of the 1974 notice; substantial efforts to identify beneficial owners were contemplated and ultimately were made in connection with dissemination of the notice of partial settlement (R. App. pp. 2a-4a; App. pp. 19, 22);* Andersen's interests were not affected by the partial settlement; and the underwriter defendants, who were paying $1,850,000 which would be at risk if notice were not sufficient, were in agreement with the proposed form and method of mailing and publication. Andersen's motion for District Court certification of an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) from the May 7, 1979 order approving the form and method of notice was denied; nevertheless, Andersen filed a notice of appeal from that order.

In an order and final judgment entered August 15, 1979, the District Court approved the partial settlement over the objections of Andersen. (App. 24) Andersen appealed from the August 15 order and the two appeals were consolidated. Neither notice of appeal purported to appeal from the order approving the method of dissemination of the notice of pendency of class action in 1974. Rather, Andersen appealed only from the May 7, 1979 order approving the form and method of providing notice of the proposed partial settlement (R. App. p. 5a) and from the order approving the stipulation of partial settlement itself (R. App., p. 6a).

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* "App." references are to pages in the Appendix to Andersen's Petition.

(b) *The Court of Appeals Decision*

The First Circuit unanimously held that Andersen lacked standing to object to the notice of proposed settlement since Andersen was not a class member, and since Andersen's *res judicata* rights could not be affected by a settlement to which Andersen was not a party (App. pp. 4-6). The Court convincingly rejected Andersen's argument that it should have standing to object to the order approving the notice of settlement to protect the interests of absent class members. The First Circuit recognized that the defendants who were parties to the settlement agreement had stronger interests than Andersen in insuring that adequate notice was given so as to protect themselves against collateral attack on the settlement by absent class members at a later date (App., p. 6). In addition, the absent class members were also protected by the responsibility of the District Court to assure adequacy of notice. In light of such considerations, the Court of Appeals held that the speculative benefits to the absent class members of allowing a non-settling defendant to object to a notice of settlement would be outweighed by the risk that non-settling defendants would employ such objections in an effort to frustrate the settlement process.* (App., pp. 6-7)

The Court of Appeals further held that on the specific facts of this litigation, Andersen was estopped to appeal the propriety of the 1974 notice of pendency of class action in 1979. It recognized that Andersen never objected to the

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* The record below showed that Andersen had regularly objected to partial settlements in other suits in which it was a defendant in an effort to increase its own bargaining leverage. Andersen's objections to such partial settlements have routinely been denied. See, *In re Bermec Corp.*, Nos. 71B 291 (CMM) and 73 Civ. 388 (CMM) (S.D.N.Y., June 23, 1978); *Greenfield* v. *Mattel, Inc.*, CV 73-515-MML (C.D. Cal., Order filed April 6, 1976).

1974 order "until five years later after extensive discovery had passed, and it is not in the position of being able to proffer any excuse for its long delay in recognizing what it now claims to be a major defect in the 1974 notice, since the primary authority for its attack on the notice is the *Eisen IV* decision of 1974." (App. 7)

In light of its disposition, the First Circuit did not address the questions concerning adequacy of notice which were raised by Andersen and which constitute the primary questions which Andersen wishes this Court to consider. (App., p. 4) For the same reason, the Court of Appeals did not address the issue whether the 1979 orders were appealable in a context where neither order constituted a final decision with respect to Andersen's involvement in the action.* (App., p. 4 n.3)

(c) *Activities Subsequent to the Court of Appeals Decision*

Subsequent to the decision of the Court of Appeals, plaintiffs entered into another partial settlement agreement with a further group of defendants under which it is proposed that the claims against those defendants will be settled for an additional cash payment of $2,000,000.00.**

At the same time that this latter settlement was materializing, Andersen continued its efforts to obstruct and delay the litigation by taking groundless steps to obtain appellate review of district court orders. In an opinion

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* See, *e.g., Darrow* v. *Southdown, Inc.*, 574 F.2d 1333, 1336 n.3 (5th Cir. 1978), *cert. denied,* —— U.S. ——, 99 S. Ct. 574 (1978), holding that a decision approving a settlement which is a final decision as to the settling parties is not a final decision with respect to non-settling defendants.

** The parties have not yet submitted to the District Court a proposed order with respect to the form and method of notice of this latter proposed settlement.

dated May 22, 1980, the First Circuit denied what it characterized as Andersen's "unusual petition for mandamus seeking reversal of several interlouctory orders. . . ." (R. App., p. 7a) *In re Arthur Andersen & Co.,* No. 80-1148. In the course of that opinion, the First Circuit criticized what it characterized as Andersen's "megadefense" which had produced a massive stream of defense activities calculated to confuse and delay the case. The First Circuit stated that it could not find "any arguable justification for challenging a [district] court under these circumstances," and indicated that it would have awarded double costs or counsel fees to plaintiffs had they been sought. (R. App., p. 16a) Such decision by the Court of Appeals provides further ground for concluding that the appeal which gave rise to the instant Petition was designed not to protect the legitimate interests of Andersen or the class, but was simply an element in Andersen's "megadefense" designed to further impede and obstruct the litigation.

Notwithstanding such efforts by Andersen to delay and confuse the litigation, the trial of this action against Andersen and the remaining non-settling defendants commenced May 27, 1980, and is currently in progress.

REASONS FOR DENYING THE WRIT

The Petition Does Not Present the "Special and Important Reasons" Which Are Essential to Issuance of the Writ.

Under Rule 19 of the Rules of this Court, certiorari will be granted "only when there are special and important reasons therefor." Examples of the reasons which would be considered are stated in Rule 19 to include the rendering of a court of appeals decision which conflicts with a decision of another court of appeals; which decides an important question of federal law which should be settled by this Court; or which decides a federal question in a way which conflicts with applicable decisions of this Court. As shown below, none of the issues raised by Andersen fall within such categories or represent "special and important reasons" to be reviewed by this Court.*

(a) ***Lack of Standing***

The Petition impliticly concedes that Andersen has no standing to contest the propriety of the notice of partial settlement. Neither of the "Questions Presented for Review" in the Petition challenges the correctness of the ruling that Andersen lacked standing to attack the 1979 orders. Nor does the Petition set forth any argument that the First Circuit's decision conflicts with other decisions dealing with a non-settling defendant's standing to attack the form or procedure of a notice of settlement.

In fact, there is substantial authority denying non-settling defendants standing to object to court orders ap-

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* Nor does Andersen suggest, or would there be any basis for concluding, that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." See Rule 19(b).

proving partial settlements or to object to the procedures employed by the district court in approving such settlements. *E.g., In Re Beef Industry Antitrust Litigation,* 607 F.2d 169, 172-73 (5th Cir. 1979). See also *Seiffer* v. *Topsy's Int'l, Inc.,* 70 F.R.D. 622, 627-8 n.5 and n.6 (D.Kan. 1976); 3 *Newberg on Class Actions* § 5660b at 564-65 (1977). As recognized by the First Circuit, Andersen's right to bind the class is not affected by a judgment which terminates the action only as to others.

Contrary to Andersen's proclaimed concern to protect its interest in finality of litigation, it seems clear that Andersen's only real interest in its attack on the notice of settlement was its desire to delay the partial settlement and to impede any final resolution of the class members' claims against Andersen. See discussion above at p. 8. As recognized by the Fifth Circuit, the objections of a non-settling defendant are particularly suspect, since the real interest of such an objector is to forestall any settlement which does not include that objector. *Darrow* v. *Southdown, Inc., supra,* 574 F.2d at 1336 and n.3. In light of the strong public policy favoring settlement of litigation (*e.g., D.H. Overmeyer Co.* v. *Loffin,* 440 F.2d 1213, 1215 (5th Cir. 1971)), this Court should not condone and encourage such activities by Andersen.

(b) *Estoppel*

Nor does Andersen raise any "special and important" issue in seeking review of the holding that it was estopped from challenging the adequacy of the 1974 notice of pendency of class action. The First Circuit did not purport to enunciate any general rule that a class action defendant could never challenge the adequacy of a notice of pendency of class action to which the defendant had originally agreed. Rather, the First Circuit relied on the specific facts of

the present record in holding only that an estoppel as to *this* defendant in *this* case existed. Consequently, this litigation provides no basis for the elaboration of any general rule concerning estoppel. As recognized by Mr. Justice Frankfurter, certiorari is inappropriate where, as here, resolution of the question at issue will determine only the matter at hand and will not have general application. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

The First Circuit had ample ground to hold that an estoppel existed on the record below. Andersen had actually been given the responsibility by the Court for representing the defendants in determining the propriety of the 1974 notice, and Andersen had not objected to that notice. (R. App., p. 1a) Thereafter, five years elapsed, during which extremely extensive discovery occurred and a highly complicated litigation was brought to the eve of trial, all in reliance upon the understanding of the parties that a class had been properly certified and that the extent of any exclusion requests was known. The case upon which Andersen primarily relies in its Petition with respect to notice requirements, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), was decided in 1974. *In re Franklin National Bank Securities Litigation*, 574 F.2d 662 (2nd Cir. 1978), *modified*, 599 F.2d 1109 (2nd Cir. 1979), upon which Andersen also relies was decided a full year before Andersen raised any complaints. Andersen did not challenge the 1974 notice until a partial settlement agreement was reached with other defendants in 1979. Under such facts, it was clearly within the authority of the Court of Appeals to determine that Andersen was estopped from raising the issue of the 1974 notice. See, *e.g.*, discussion of the doctrine of judicial estoppel in *In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975).

Such a decision does not conflict with any decisions of this Court or of the Circuit Courts. Contrary to Andersen's argument, the First Circuit did not hold that a class designation or a decision concerning adequacy of notice is immutable; nor did it hold that in no circumstances will a defendant ever be allowed to challenge the adequacy of notice already given and consented to. Nor is there anything in the opinion to suggest that if a notice of pendency was insufficient in the rare situation where a defendant was estopped from challenging that notice, a class member who did not receive notice would not be able to obtain relief from his inclusion within the class. The decision on estoppel was carefully limited to the facts of this case, and does not represent a decision of general importance with respect to which a Writ of Certiorari should issue.

(c) *Purported Issues Concerning the Form and Method of Notice to Class Members*

Andersen tries to create the impression that important issues are raised concerning class action notice procedures. On the contrary, the Court of Appeals expressly refused to address any questions concerning the adequacy of notice, and dismissed the appeal on other grounds. In consequence, there is no decision on a question of notice procedure for this Court to review, and there is no conflict among the Circuits for this Court to resolve.

This Court has often recognized that it would be inappropriate to issue a writ for the purpose of determining constitutional questions when such determinations are unnecessary to the resolution of the case. *E.g., Duncan* v. *Tennessee,* 405 U.S. 127 (1972); *Piccirillo* v. *New York,* 400 U.S. 548 (1971). Such considerations apply in the present case, where Andersen seeks to raise due process issues under the Fifth Amendment despite the fact that the Circuit

Court never addressed such issues and found other grounds dispositive.

There is no basis for this Court to conclude that the opinion of either the District Court or the Court of Appeals creates a conflict among federal courts concerning notice requirements. It is uncontested that all the parties including Andersen agreed that the 1974 orders were appropriate at the time they were issued; that the notice requested any nominees to whom it was mailed to retransmit the notice to the beneficial owners; and that at least 12,880 of the 13,960 persons to whom the 1974 notice was mailed were in fact beneficial owners (R. App. p. 3a). Furthermore, there is no basis for consideration of the 1974 orders, since Andersen appealed only from the 1979 orders (R. App. pp. 5a-6a) and was properly held estopped from challenging the 1974 orders at this late date. With respect to the 1979 orders, the record shows that very substantial efforts were made to identify beneficial owners in connection with the distribution of the notice of partial settlement. (App., p. 22; R. App. pp. 2a-4a)* In such a context, neither the District Court nor the Court of Appeals decision represents any conflict with notice requirements as discussed in *In Re Franklin National Bank Securities Litigation, supra* or in *Eisen IV*. The notice procedures implemented by the District Court in 1979 would fully comply with the requirements suggested by any authority cited by Andersen and may actually exceed the "reasonable effort" standard mandated by Rule 23(c)(2) for a notice of pendency.**

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* No objections to the proposed settlement were received subsequent to such notice procedures, further suggesting the lack of any reason to question the validity of the 1974 notice.

** It should be noted that the notice of partial settlement below was not issued pursuant to the mandatory notice provisions of Rule 23(c)(2). Rather, that notice was issued pursuant to Rule 23(e) which states that a notice of proposed dismissal or compro-

(Footnote continued)

In its Petition, Andersen has changed its position and is no longer treating the sufficiency of either the 1974 or the 1979 notice as the essential issue. Rather, Andersen now argues that whenever, subsequent to the issuance of a notice of pendency of class action, the parties are able to identify certain class members whose names and addresses were not known at the time the notice of pendency was issued, the Court must offer those newly identified class members the right to opt out of the class.

This question was neither raised before nor addressed by the Court of Appeals. The question is inapplicable in the present instance both because Andersen is estopped to challenge the 1974 notice of pendency and because adequate notice was provided in 1974 to all the members of the classes by a combination of mailings to the known beneficial owners and the nominees of the unknown beneficial owners with a request to retransmit the notice, and through publication. Under Rule 23(c)(2), individual notice of pendency of class action is not required to be given to each and every class member, but only to those class members "who can be identified through reasonable effort." Once a reasonable effort has been made, class members who do not request exclusion from the class "by a specified date" are bound by the results of the class action. Rule 23(c)(2). While a district court has the authority to relieve a class member who did not receive notice from the effect of the judgment, the class member must carry the burden of affirmatively showing that he did not receive notice and

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mise "shall be given to all members of the class in such manner as the court directs." It has been held that such language does not incorporate the individual notice requirements of Rule 23(c)(2), but is "measured against the broader standards of due process to which the class action procedure is of course subject, rather than the requirements of rule 23(c)(2) as interpreted in *Eisen*." *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1126-27 (9th Cir. 1977).

that his delay in coming forward is excusable. *E.g., In re National Student Marketing Litigation* v. *The Barnes Plaintiffs,* 530 F.2d 1012 (D.C. Cir. 1976).

Under such authority (and contrary to Andersen's argument), beneficial owners of nominee name securities who were not on plaintiff's mailing list are not thereby entitled to sit on the sidelines with impunity and decide whether or not to collaterally attack the judgment if they are unsatisfied with the result. Rather, it is Andersen's approach which would have detrimental results both with respect to the public policy of seeking to avoid one-way intervention and the administrative complexity of class actions. The fact that a beneficial owner of a nominee name security was not actually mailed the notice of pendency does not mean that he was not apprised of the existence of the class action. Often (as here) there will have been publication notice which informed him of the pendency of the action. In many instances, nominees will have retransmitted the notice to the beneficial owner. In consequence, establishing a rule that subsequent identification of the class member entitles him to a second opportunity to opt out would encourage the very sideline sitting and one-way intervention which Andersen says it wishes to avoid.

Unless the parties can rely on the deadline for exclusions in the notice of pendency as being the date after which the essential character of the class will have been determined, the parties will be left in serious uncertainty concerning the nature of the class. That uncertainty could undercut settlement negotiations and would involve significant questions concerning the binding effect of any judgment in the class action. Such disadvantages would be further compounded by the fact that a requirement of mailing a new invitation to opt out to any beneficial owner who becomes

known subsequent to the deadline for exclusions would add greatly to the administrative complexity of the class action. There is no practical way to distinguish those many class members who received the 1974 notice from those few who did not. Accordingly, a new invitation to opt out would give many persons a "second shot" at opting out contrary to the spirit of Rule 23.

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
June 5, 1977

Respectfully submitted,

JARED SPECTHRIE
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

STEPHEN S. MOULTON
50 Congress Street
Boston, Massachusetts 02109
(617) 742-5550
Attorneys for Respondents

Of Counsel:

MILBERG WEISS BERSHAD
& SPECTHRIE
JEROME M. CONGRESS

APPENDIX

Transcript of District Court Proceedings, February 26, 1974, pp. 10-12

[10] * * *

The Court: All right. What is your [11] pleasure, gentlemen: Can Mr. Moulton [attorney for plaintiffs] take care of these revisions and just submit it to the Court for signature or is it necessary for us to convene once again for that purpose?

Doesn't seem to me that I need you people here to sign it. As a matter of fact, I'm going to be here all day. You people, I guess, are going to be able to be here for a little while. Might be able to accomplish it while I'm here, and I can sign it a little later.

Mr. Moulton: Yes. I think I recollect that we agreed that we would also put in a reference to the list as being an exhibit which will be filed with the clerk. So that there will have to be some textual change, but I can have it done today and have it in your Honor's hands by the end of the day.

The Court: Can we all agree that that is an appropriate procedure?

Perhaps you can show the document to Mr. Lewald [attorney for Andersen] as being the document that I am to sign with the agreement of all parties, if his satisfaction would be agreeable to all the other parties. Is that all right with everybody? Is that all right with you, Mr. Lewald?

Mr. Lewald: Yes, your Honor.

[12] The Court: Okay. We will proceed that way. When you and Mr. Lewald agree on a final document, you can mail it to me or have it delivered to the clerk, and I will execute it, and we will notify you that it is executed.

* * * * *

Letter of Plaintiffs' Attorneys to Judge Tauro dated June 28, 1979

June 28, 1979

Honorable Joseph L. Tauro
U.S. District Judge
John W. McCormack Post Office
and Courthouse
Boston, Massachusetts 02109

Re: Viatron Computer Systems Corporation
Securities Litigation
No. MDL-138-T

Dear Judge Tauro:

Pursuant to the order signed by you May 7, 1979, plaintiffs are scheduled to mail notice of the hearing on the proposed partial settlement with the underwriters on July 5, 1979, and to publish notice of the proposed settlement on that same date. Your order provides that plaintiffs shall take such reasonable steps as the Court determines are necessary to identify and provide notice to beneficial purchasers and shall periodically report to the Court thereon (Order, page 5, paragraph 2(c)).

This letter will constitute a report to the Court with respect to the steps plaintiffs' counsel have taken to identify and provide notice to beneficial purchasers. Plaintiffs have caused the lists of record purchasers to be reviewed to extract therefrom those persons whose names suggested that they might be nominees. For instance, names which appear to be brokeage firms, banks, investment houses and the like, were compiled from the original list of record holders. The

Letter of Plaintiffs' Attorneys to Judge Tauro dated June 28, 1979

original mailing list of Viatron purchasers of record included approximately 11,560 purchasers of common shares and approximately 2,400 purchasers of debentures. Of those two lists, approximately 1,080 names which appeared to be nominees were extracted. Letters were sent to those persons in the form included as Exhibit C to the documents pertaining to the partial settlement previously submitted to the Court, requesting that those persons notify us of the identity of the beneficial purchasers for whom they purchased and offering to pay each of them the reasonable costs of their search. (The letter stated that reasonable costs were anticipated to be $200 or less unless we approved greater expenses.) Of the 1,080 letters mailed, approximately 330 have been returned as undeliverable. Presumably, the apparent nominees to whom those letters were addressed have gone out of business, moved or merged. We have been attempting to locate those nominees, and about 50 of them have been located and recontacted to supply the identity of beneficial purchasers.

With respect to the remainder, we have to date received approximately 20 responses which have encompassed approximately another 125 names. Moreover, pursuant to the Court's order of May 4, the settling underwriters, who constituted the selling syndicate with respect to Viatron's offering of December 1969, have supplied to us approximately 1,450 additional names of beneficial purchasers for whom said underwriters acted as nominee.

We are informed by underwriters' counsel that generally the underwriter syndicate accounts for a sizeable percent-

age of the nominee trading in any security, at least in the time frame reasonably close to the offering.

* * *

Respectfully yours,

MILBERG WEISS BERSHAD & SPECTHRIE

By /s/ JARED SPECTHRIE
Jared Specthrie

MOULTON & LOONEY

By /s/ STEPHEN MOULTON
Stephen Moulton

cc: All Counsel

Notice of Appeal dated June 4, 1979

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

MDL-138-T

In Re: VIATRON COMPUTER SYSTEMS CORPORATION

Notice is hereby given that defendant Arther Andersen & Co. hereby appeals to the United States Court of Appeals for the First Circuit from the order attached hereto as Exhibit A and entered in this action on the 7th day of May, 1979.

Dated: June 4, 1979

ARTHUR ANDERSEN & Co.

By its attorneys

/s/ STEVEN T. HOORT
George H. Lewald
William F. McCarthy
Steven T. Hoort
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

and

Charles W. Boand, Esq.
Wilson & McIlvaine
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212

Notice of Appeal dated August 24, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Consolidated No.: MDL-138-T
Civil No.: 71-3022, 73-2594, 72-3376, 72-3375
75 Civ. 5668 (MBF)

In Re: VIATRON COMPUTER
SYETEMS CORPORATION

Notice is hereby given that Arthur Andersen & Co., a defendant in these consolidated actions, hereby appeals to the United States Court Of Appeals For The First Circuit from the Order And Final Judgment, approving the Stipulation Of Settlement dated November 29, 1978, between the plaintiffs and the defendant underwriters, which was entered in this action on the 15th day of August, 1979.

ARTHUR ANDERSEN & Co.
By its attorneys,
/s/ STEVEN T. HOORT
George H. Lewald
Thomas G. Dignan, Jr.
William F. McCarthy
Steven T. Hoort
Ropes & Gray
225 Franklin Street
Boston, Massachusetts
(617) 423-6100
and
Charles W. Boand, Esq.
Wilson & McIlvaine
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212

Dated: August 24, 1979

In re Arthur Andersen & Co., No. 80-1148
(1st Cir., May 22, 1980)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1148

In re
ARTHUR ANDERSEN & Co.,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

George H. Lewald, with whom Thomas G. Dignan, Jr., William F. McCarthy, Steven T. Hoort, Jess T. Fardella, Ropes & Gray, Charles W. Boand, and *Wilson & McIlvaine* were on brief, for petitioner.

Jared Specthrie, with whom *Edwin J. Mills, Milberg, Weiss, Bershad & Specthrie, Stephen Moulton,* and *Moulton & Looney* were on brief, for respondents.

May 22, 1980

COFFIN, *Chief Judge.* This is an unusual petition for mandamus seeking reversal of several interlocutory orders entered by the district court. The orders arise out of a lawsuit by two classes of purchasers of securities of a company (Viatron) against various officers and directors of the

company, and its suppliers, auditors, underwriters and consultants because of the alleged furnishing of false information on which they relied to their detriment. Petitioner, Arthur Andersen & Co., the auditor of Viatron, seeks mandamus review of orders denying motions to see and copy proofs of claim of alleged purchasers of Viatron debentures and common stock. Petitioner also seeks mandamus review of an order denying a motion for leave to file a cross-claim and third party complaint naming Arthur D. Little, Inc. (Little) as a defendant.

One of the plaintiff classes brought its lawsuit in 1971, the other in 1973, Anderson being a defendant in both cases. Little was made a defendant in 1975. In 1978 plaintiffs entered into a settlement with Viatron's underwriters. In later 1979 and early 1980 another settlement was negoated between plaintiffs and Little and various of Viatron's suppliers.

On May 7, 1979, the district court issued an order to implement the settlement with the underwriters, fixing the procedures for testing the fairness and adequacy of the settlement and for determining distribution of the partial settlement fund. In connection with the latter, the court required that each class member desiring to participate file a proof of claim, postmarked no later than October 3, 1979, by sending it to the Clerk of the court at a post office box rented at the expense of plaintiffs' counsel "for the purpose of receiving proofs of claim and other communications from class members with regard to the [notice of hearing on fairness and stipulation of settlement]. The post office box to be used was in the General Post Office in the city of New York. The notice sent to class members pursuant to the May 7 order concluded by saying, under

the caption "Court File Available", "All documents filed in the Actions may be inspected at the office of the Clerk of the United States District Court for the District of Massachusetts . . . ."

Andersen moved, on November 21, 1979, for access to inspect and copy the proofs of claim on the ground that they were court records. This was denied without opinion on December 6, 1979. A motion for rehearing was denied on January 11, 1980. On January 15, 1980, Andersen again sought access to the proofs of claim via a motion to reopen discovery (which the court on June 5, 1979, ordered completed by August 17, 1979) on the ground that proof of damages, presumably derivable from data in the proofs of claim concerning net proceeds of sale, is "an integral part of plaintiffs' alleged causes of action". This motion was denied on January 16, 1980.

Meanwhile, Andersen had moved for leave to file a cross-claim and third party complaint against Little on January 11, 1980.[1] Pointing out, with a sense of inverse relevance, see n. 1, that if its motion were denied, it would be the only one to receive this disposition, Andersen urged that a separate suit against Little could be avoided and that Little could "in no way" be prejudiced. On January 18, 1980, the district court, rehearsing the history of four years of

[1] Some fourteen other cross-claims and third party complaints had, after hearing and/or submission, been granted by a magistrate on October 29, 1979. Despite a colloquy on May 4, 1979, in which the district court, commenting on Andersen's fear of inconsistent results if suit in an action for indemnity were to be brought in another forum, raised the possibility of a cross-claim in the instant litigation, Andersen took no action for the next eight months. Subsequent to the denial of the motion for leave to file, Andersen initiated two independent actions against Little, one in New York and one in Massachusetts.

discovery leading to the settlements and leaving only essentially the litigation between plaintiffs and Andersen, denied the motion.

Perhaps the most palpable impression we distill from our reading of the record in this case is that of what might be called a megadefense. The extent to which even in this small salient of a much wider front a stream of motions, memoranda, requests for clarification and reconsideration can be filed on multiple issues without surcease is truly impressive.

To begin with, it ought not be, but it is, necessary to observe the severe standards which govern the issuance of mandamus. Andersen properly invokes *Kerr* v. *United States District Court*, 426 U.S. 394 (1976), citing to some of the prerequisites of "extraordinary circumstances"; the lack of other means to attain relief; and establishing an indisputable right to the writ. *Id.* at 403. The Court uses even stronger language in equating "exceptional circumstances" to "a judicial 'usurpation of power' ". *Id.* at 402. We have echoed these criteria and specifically have noted their inapplicability "to obtain review of an otherwise unreviewable interlocutory order". *USM Corp.* v. *GKN Fasteners, Ltd.*, 574 F.2d 17, 23 (1st Cir. 1978).

With these brooding admonitions hovering over us, we consider each of the three purported bases for mandamus. The first is the motion for access to the proofs of claim based simply on the grounds of their alleged status as court records. Andersen's authorities are, to say the most, less than dispositive. *International Business Machines Corp.* v. *Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975), says simply that "the trial record is composed of the proceedings in the District Court including all papers, exhibits,

and affidavits on file with the court", adding, "It is not the type of paper submitted but rather the fact of filing which determines whether a particular item will be included in the record." *Id.* For this latter proposition, it cites *Todd* v. *Nello L. Teer Co.*, 308 F.2d 397 (5th Cir. 1962), which involves a letter from an attorney to a trial judge attempting to retract a concession as to a point of law. The letter was marked "filed", bore notations presumably by the judge indicating his denial of a motion enclosed with the letter, and was in fact placed on the court file. That such a letter was held part of the record can shed little light on our present inquiry.

References to the treatises suggest that some closer nexus to the judge or clerk must be intended before a paper becomes part of a case record, at least for purposes of FRAP Rule 10.[2] In 9 Moore's Federal Practice, ¶ 210.04, at 10-14, we read, "The term original papers refers, then, to all papers presented to the district court and filed in the record and to all papers filed by the district court itself." In 16 Wright and Miller, Federal Practice and Procedure, § 3856, at 386, the definition, if anything, is narrower: "Under [Rule 10(a)], only those matters that were in fact presented to the district court are considered part of the record on appeal; matters that were merely lodged with the clerk or never offered in evidence are excluded from the definition."

Whether the proofs of claim, even if they are potential record material, were "filed with the court" in accordance

---

[2] Rule 10(a) reads:

"Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries . . . shall constitute the record on appeal in all cases."

with Rule 5(a), Fed. R. Civ. P.,[3] presents another problem. In 4 Wright and Miller, *id.* at § 1153, at 599, the authors pointed out that some courts have held that filing was not accomplished-even by leaving a notice under the door of the clerk's office after hours, and that uncertainty is best avoided by personal delivery, whether at the clerk's office or his home. *See also* 2 Moore, *id.*, ¶ 5.11, at 1391-92. Moreover, the case authorities on depositions indicate that they do not become part of the record until they are presented to the court. *Dictograph Products Co.* v. *Sonotone Corp.*, 231 F.2d 867 (2d Cir. 1956); *Daiflon, Inc.* v. *Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1976), *cert. denied*, 429 U.S. 886 (1976); *Busse* v. *United States*, 542 F.2d 421 (7th Cir. 1976).

Andersen also seeks support from a statute designed, we think, more for archival guidance than for court operations, 28 U.S.C. § 457. This merely provides that court records are to be kept where the court sits. Were this, however, to be taken literally, it would cut against any claim that the proofs of claim ordered to be sent to New York were part of the records of a case in a Massachusetts district court. Or, if the statute be thought to require that such proof ought never have been ordered sent to New York in the first place, the absurdity of the barrier thus erected to efficient processing of claims is apparent.

Our distillation from all this is that we are not sure that the proofs of claim sent to the New York postal box

---

[3] Rule 5(3) reads:

"Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him. . ."

are yet case "records", or that, if they are, they are presently disclosable to Andersen. We doubt that Andersen can have such a present interest in the statements of plaintiffs who have chosen to settle with other defendants, such plaintiffs not by any means necessarily being all of the plaintiffs who are suing Andersen. Moreover, the fact that the court-approved notice to claimants ends with a reference to the "court file" being subject to inspection in Massachusetts suggests an intent that proofs of claim in the processing, winnowing, and correcting stage have not yet reached the status of case records filed in court. But whatever our doubts may be as to these matters we are crystal clear that whether or not Andersen has a right to these records can be determined by proper motions at later stages of this litigation and that the district court's denial of this first motion cannot, with any composure, be termed a usurpation of power.

Andersen's second basis for mandamus lies in the court's denial of its motion to gain access to the proofs of claim, not because they were court records, but because the information in the hands of plaintiffs' counsel was discoverable since it bore on verification of proof as to damages. The existence of a megadefense was underscored in the documents submitted to the court revealing that Andersen contemplated calling as witnesses "[r]esearch analysts of every broker, mutual fund or other institutional investor who has filed a proof of claim", and "[e]very individual who, and a financial officer of any corporation, partnership, association or other entity which, filed a proof of claim." Andersen has proposed a minimum of some 65 pages of special questions to be put to the jury, many of them requiring specific findings as to each class member. Another

proposed list of some 60 voir dire questions, to be asked every juror, included inquiries as to whether the jurors were related to or acquainted with any of the 2400 plaintiffs or their counsel.

In support of its argument that the material sought in the discovery motion is relevant to its defense, Andersen pointed out in its motion that the data contained in the proofs of claim would be relevant to determining damages. In addition, in its argument, Andersen asserts that the combination of data on the state residency of claimants and the dates of purchase and sale would bear on the questions of whether each plaintiff purchased in justifiable reliance on alleged misrepresentations or sold with actual knowledge of misstatements or facts sufficient to put one on inquiry.

The original ground for discovery assigned, relevance to damages, obscures the basic proposition that plaintiffs bear the burden of proof. When, whether, and to what extent use of data in the proofs of claims may be relevant, e.g., for impeachment purposes, will depend on whether the issue of damages is severed and made the subject of separate proceedings. *See* 3B Moore's *Federal Practice*, ¶ 23.02, p. 23-65, and ¶ 23.46, p. 23-407. The reasons subsequently assigned as justifying immediate and mandatory discovery are no more persuasive. Residence of a plaintiff at the time of purchase, rather than at the time of filing proof of claim would seem to be the only relevant data bearing on the appropriate limitations period. Insofar as reliance is concerned, this may or may not be a matter for individual proof; in the latter event it most likely would be addressed in a severed proceeding. But in any case the mere amounts and dates of purchases and sales are not, at least facially,

demonstrably relevant to whether or not a plaintiff used due diligence. The extent to which information from each class member may be used in attempting to establish plaintiffs' case or may be relevant in defense will depend in large part upon decisions made by the court in its continuing and demanding task of managing this litigation. *Cf. Blackie* v. *Barrack,* 524 F.2d 891 (9th Cir. 1975).

At this stage, the eve of trial between plaintiffs and Andersen, we see no abuse of discretion, certainly no usurpation of power, and no lack of remedy if Andersen were subsequently to feel deprived of information essential to its defense.

We come, finally, to Andersen's eleventh hour motion for leave to file a cross-claim and third party complaint against Little. The district court very cogently invoked *In re Cessna Distributorship Antitrust Litigation,* 532 F.2d 64 (8th Cir. 1976), which is comprehensively apposite. There the delay in filing a cross-claim was only three not four or five years. There, as here, the court faced a complex, hard earned settlement, the benefits of which would have been largely negated by allowing the cross-claim. There, as here, the movant was still able, if losing the instant litigation, to bring a separate action over for indemnity or contribution.

In this case trial is now, after prolonged preliminaries, set for May 27, 1980. Were Little to be brought in at this late date,[4] not only would it be deprived of much of the near term peace for which it has bargained but trial would

[4] Andersen cites as reason for its delay a secret agreement which it had with Little tolling the statute of limitation. While this agreement may have made the delay possible, however, it in no way constitutes a justification for the delay in filing the claim in the face of the district court's repeated entreaties and efforts to conduct the litigation efficiently.

most probably be postponed for a substantial period to allow preparation. And the issues would perforce be extended to cover not only plaintiffs' diligence and reliance, Andersen's conduct and the reasonableness thereof, but also Little's conduct and its reasonableness, which would also trigger an inquiry into the conduct of vendors and their reasonableness. Moreover, if Andersen were to prevail, any action over against Little would be mooted.

We said at the outset that this was an unusual petition. We so bespoke ourselves in view of the conjunction of orders which are only interlocutory or subject to broad discretion, or both; the questionable or at least fragile posture of petitioner's claim; and the fact that other avenues of adequate relief are available. Having in mind the austere standards governing the dispensation of mandamus, we cannot find any arguable justification for challenging a court under these circumstances. Plaintiff-respondents, however, have not sought double costs or counsel fees and we shall not venture where they have been reluctant to tread.

The petition for writs of mandamus is denied.

79-1765 791765

Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ARTHUR ANDERSEN & CO.
Petitioner

v.

DAVID STEWART and
CHANNING SECURITIES, INC.
Respondents

ARTHUR ANDERSEN & CO.
Petitioner

v.

JULES SANDERS and MADALYNN SANDERS
Respondents

AND THREE OTHER ACTIONS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GEORGE H. LEWALD
THOMAS G. DIGNAN, JR.
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

CHARLES W. BOAND
Wilson & McIlvaine
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212
Attorneys for Petitioner

Of Counsel:

WILLIAM F. MCCARTHY
STEVEN T. HOORT
JESS T. FARDELLA
Ropes & Gray
225 Franklin Street
Boston,
Massachusetts 02110
(617) 423-6100

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Fed. R. Civ. P. 23	Passim

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This brief is submitted by Arthur Andersen & Co. ("Andersen") in reply to respondent's brief in opposition to Andersen's Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit. This reply will address particular matters raised by respondents' in their brief in opposition.

REPLY TO RESPONDENTS' STATEMENT AS TO JURISDICTION

Respondents state that the Court of Appeals concluded it was unnecessary to decide the question of appellate jurisdiction. Although stating this was its conclusion, the Court of Appeals nonetheless went on to hold that Andersen was estopped from asserting that class members identified after the initial notice in 1974 must be provided with individual notice of their rights to intervene in the class action or to opt out from the class. This holding by the Court of Appeals, the same as the decision of the District Court, is itself a final decision on an issue collateral to the merits on a substantial question of federal law and subject to immediate interlocutory review pursuant to the collateral order doctrine. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Gillespie* v. *United States*, 379 U.S. 148, 153 (1964); *Cf. Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 347, n. 8 (1978) (order allocating the cost of class notice subject to immediate interlocutory review).

REPLY TO RESPONDENTS' STATEMENT OF REASONS FOR DENYING THE WRIT

(a) Standing:

Respondents assert that neither of the questions presented for review "challenges the correctness of the ruling that Andersen lacked standing to attack the 1979 orders."

Brief in Opposition, p. 9. This assertion is incorrect. The Court of Appeals concluded that Andersen had no standing to challenge the 1979 orders on two separate grounds. It held first that insofar as the 1979 orders approved a notice of partial settlement that Andersen had no standing because Andersen was not a party to the settlement. The second basis for its decision, and the issue before this Court, is the Court of Appeals' conclusion that Andersen's standing to raise issues regarding the notice requirements of Fed. R. Civ. P. 23(c)(2) extended only to the proceedings approving the initial notice to the class in 1974. *See Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit* (hereinafter "*App.*"), pp. 6-7. Both of the "Questions Presented for Review" are addressed specifically to the Court of Appeals' latter conclusion that Andersen could not assert in 1979 that class members identified subsequent to the notice in 1974 must also be provided with individual notice of their right to intervene or to opt out as mandated by Fed R. Civ. P. 23(c)(2).

(b) Estoppel:

Respondents assert that this case provides no basis for elaboration of any general rule of estoppel because the Court of Appeals relied on the specific facts of the present record to conclude an estoppel existed. The ruling of the Court of Appeals was to the contrary, and this case presents the issue of whether a litigant may be estopped from asserting that class members identified after an initial notice in a class action for damages must nonetheless be provided with individual notice of their rights as class members.

The record of the proceedings below amply depicts the generality of the issues before this Court. Andersen asserted before the Court of Appeals that the record of the proceedings in 1979 demonstrated that beneficial purchaser

class members to whom individual notice had not been directed in 1974, were identifiable inasmuch as 4,600 beneficial purchasers had been identified and provided with individual notice of the partial settlement in 1979. Andersen argued that under Fed. R. Civ. P. 23(c)(2) and this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 176 (1974), these class members who were identified in 1979 must be provided with individual notice of their right to intervene in the action or to exclude themselves from the class. The *Brief for Appellant,* pp. 32-34, provided specifically in part as follows:

"[ARGUMENT]

III. The Beneficial Purchasers Have Not Been Provided with Individual Notice of Their Right and Afforded an Opportunity to Exclude Themselves from the Respective Classes as Required by Rule 23 and the Due Process Clause of Amendment V to the Constitution of the United States.

The district court has never directed that any of the beneficial purchasers of Viatron securities be provided with notice of their right, and afforded an opportunity, to exclude themselves from the respective class actions. The joint notice of pendency of class actions in 1974, which provided members of the respective classes with the only notice of and opportunity to exclude themselves, was directed solely to the record holders of Viatron securities, including those nominees holding securities registered in 'street names' on behalf of the beneficial purchasers.

* * *

The record of the proceedings in 1979 with respect to the notice of the proposed settlement with the underwriters demonstrates that some of the beneficial purchasers could have been provided with individual notice of their right, and afforded an opportunity, to exclude

> themselves from the respective classes in conformance with Rule 23(c)(2)(A), (B), (C), Fed. R. Civ. P.
>
> * * *
>
> Rule 23(c)(2, Fed. R. Civ. P., requires that individual notice of their right to be excluded be provided to these identified class members and to all other members of the respective classes who can be identified through reasonable efforts."

The Court of Appeals rejected this argument. It concluded that even though a substantial number of class members were identified for the first time in 1979, this fact was not a circumstance which warranted consideration of whether these class members must be provided with individual notice of their right to intervene or to opt out as required by Fed. R. Civ. P. 23(c)(2). This conclusion is made apparent by its refusal to review the adequacy of the initial 1974 class notice in light of the subsequent identification of additional class members (*see App.*, pp. 5-6, where the Court of Appeals states that Andersen's interest in maximizing the *res judicata* effect of any judgment in its favor provides it with standing only to challenge the adequacy of the initial notice in 1974), and by the Court of Appeals' specific statement that Andersen is now estopped to raise issues regarding the adequacy of notice under Fed. R. Civ. P. 23(c)(2) because:

> "[Andersen] is not in the position of being able to proffer *any* excuse for its long delay in recognizing what it now claims to be a major defect in the 1974 notice, . . ." (*App.*, p. 7, emphasis added)

The two "Questions Presented for Review" and the "Reasons for Granting the Writ" set forth in the petition demonstrate that under prior decisions of this Court and of other Circuits, estoppel principles are wholly inapplicable and do not preclude reconsideration of an issue in light of a material change in the circumstances upon which resolution of the issue depends. *See Petition for Writ of Certiorari,*

pp. 12-14. The Court of Appeals holding in this case squarely presents the question of whether under Fed. R. Civ. P. 23(c)(2) and due process the fact of class members being specifically identified for the first time is a material circumstance which requires consideration of whether such class members must be provided with individual notice of their rights under Fed. R. Civ. P. 23(c)(2)(A)(B)(C). *See Petition for Writ of Certiorari,* pp. 7-10. Resolution of this issue does not depend on any circumstances peculiar to this case but, rather, on circumstances which are common to all class actions for damages.

The effect of the Court of Appeals' holding as to estoppel would appear to preclude Andersen from raising on appeal, after the trial in progress in the event of an adverse judgment, the inadequacy of the 1974 notice, in the light of the 1979 data, order and notice, despite the fact that no judgment has been entered on the 1974 order approving the 1974 notice and that the time for appeal with respect to the 1974 order and notice will not commence to run until final judgment is entered on the trial in progress. *See United States* v. *Indrelunas,* 411 U.S. 216, 219-221 (1973); *Bankers Trust Co.* v. *Mallis,* 435 U.S. 381, 384-385 (1978), *reh. denied* 436 U.S. 915 (1978). *See also Petition for Writ of Certiorari,* p. 12, n. 3.

(c) Issues Concerning the Form and Method of Notice to Class Members:

Respondents assert that there is no practical way to distinguish class members who may have received the 1974 notice, by publication or otherwise, from those class members who did not, and that this administrative consideration should excuse not providing individual notice pursuant to Fed. R. Civ. P. 23(c)(2) to the class members identified for the first time in 1979. Fed. R. Civ. P. 23(c)(2), however, requires that the District Court "shall direct" notice to the class, ". . . including individual notice to all members who

can be identified through reasonable efforts." *See Oppenheimer Fund, Inc.* v. *Sanders,* 437 U.S. 340, 354, n. 21 (1978); *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. at 176. It is undisputed that in 1974 the District Court directed individual notice only to those persons holding record title to securities of Viatron Computer Systems Corporation. *App.* pp. 13, 15-16.[1] It is likewise undisputed that 4,600 persons who allegedly purchased Viatron securities but who did not hold record title to the securities were identified for the first time in 1979 and that the District Court has never directed that individual notice be provided to any of these class members of their right to intervene or to opt out as required by Rule 23(c)(2)(A)(B)(C). The clear language of Fed. R. Civ. P. 23(c)(2) resolves any doubts as to whom such individual notice was required to be provided in 1979.

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[1] Respondents' assertion in their *Brief in Opposition,* p. 13, that "at least 12,880 of the 13,960 persons to whom the 1974 notice was mailed were in fact beneficial owners" is a mischaracterization apparently calculated to mislead this Court. The persons to whom notice was directed in 1974 were strictly record holders of Viatron securities, and not beneficial purchasers. Some of these record holders may in fact have been the owners of the securities recorded in their names, but the 1974 notice was directed solely to these persons and not to any of the class members whose securities were recorded in street names by brokerage houses, banks and other entities as nominees of beneficial purchasers.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR ANDERSEN & Co.

GEORGE H. LEWALD
THOMAS G. DIGNAN, JR.
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

CHARLES W. BOAND
Wilson & McIlvaine
135 South LaSalle Street
Chicago, Illinois 60603
(312) 263-1212

Of Counsel:

WILLIAM F. MCCARTHY
STEVEN T. HOORT
JESS T. FARDELLA
Ropes & Gray
225 Franklin Street
Boston,
Massachusetts 02110
(617) 423-6100

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